

**BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION**

**WCC NO. F513569**

**TASHA LUNDY, WIDOW OF  
FLOYD LUNDY, DECEASED EMPLOYEE,  
AND AS MOTHER AND NEXT FRIEND  
OF TAYLAN AND GAVIN FERRINGTON**

**CLAIMANT**

**ANTHONY FOREST PRODUCTS, INC.,  
EMPLOYER**

**RESPONDENT NO. 1**

**WAUSAU BUSINESS INSURANCE CO.,  
INSURANCE CARRIER/TPA**

**RESPONDENT NO. 1**

**DEATH & PERMANENT TOTAL  
DISABILITY TRUST FUND**

**RESPONDENT NO. 2**

**OPINION FILED NOVEMBER 29, 2007**

Hearing conducted before Administrative Law Judge S. Dale Douthit in El Dorado, Union County, Arkansas.

Claimant was represented by Mr. Brian H. Ratcliff, Attorney at Law, El Dorado, Arkansas.

Respondent No. 1 was represented by Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 was represented by Ms. Judy Rudd, Attorney at Law, Little Rock, Arkansas.

**STATEMENT OF THE CASE**

On September 12, 2007, the above captioned claim came on for a hearing in El Dorado, Arkansas. A prehearing conference was conducted on June 13, 2007, and a Prehearing Order was filed on June 14, 2007. A copy of the Prehearing Order was marked as "Commission Exhibit 1" and made a part of the record herein without

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objection, subject to any modifications made on the record. The agreement regarding apportionment for benefits is blue-backed herein as Commission Exhibits 2, 3, and 4.

At the full hearing, the parties stipulated to the following:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The employee-employer-carrier relationship existed at all relevant times, including December 8, 2005, when Floyd Lundy sustained a fatal injury.
- 3) At the time of Mr. Lundy's death his average weekly wage was \$706.30 per week.
- 4) The parties agreed to reserve any and all issues not specifically addressed herein.
- 5) Subsequent to the September 12, 2007, hearing the parties jointly stipulated by letter that should the Commission deem Taylan and Gavin Ferrington not to be eligible dependents of Floyd Lundy then the remaining children of Mr. Floyd Lundy would receive \$105.92 each. Pursuant to the same joint stipulation, the parties agreed that should the Commission deem all four children as eligible dependents, including Taylan and Gavin Ferrington, then each child would receive \$73.58.

At the full hearing the parties agreed the sole issue to be presented for determination is whether the decedent's stepchildren, Taylan and Gavin Ferrington, are entitled to receive workers' compensation benefits and attorney's fees.

At the full hearing the claimants, Taylan and Gavin Ferrington, contended that as stepchildren of the decedent, Floyd Lundy, they are dependents and entitled to receive benefits pursuant to the Arkansas Workers' Compensation Commission Act;

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that respondent, Wausau Insurance Company, has not controverted the dependence of the decedent's stepchildren, Taylan and Gavin Ferrington. Respondent, Death & Permanent Total Disability Trust Fund, has controverted benefits payable on behalf of the decedent's stepchildren and maximum attorney's fees should be awarded.

Respondent No. 1 contended at the full hearing that Wausau Insurance Company is paying dependency benefits to the widow and four children, and two of the children are biological children of the deceased employee which are named Dustin Lundy and Logan Lundy. Two of the children are stepchildren of the deceased which are named Taylan and Gavin Ferrington. The Death & Permanent Total Disability Trust Fund has refused to accept the payment of benefits to the stepchildren and Wausau Insurance Company has not controverted any portion of this claim.

Respondent No. 1 contended it is entitled to a credit for benefits if there is a determination that there are only two dependents instead of four. However, issues related to offsets/credits were reserved.

Respondent No. 2, Death & Permanent Total Disability Trust Fund, contended at the full hearing that the decedent's stepchildren, Taylan and Gavin Ferrington, are not dependents pursuant to Arkansas law. Specifically, Respondent No. 2 contended that the Court of Appeals opinion in Hoskins v. Rogers Cold Storage, 52 Ark. App. 219 (1996), supports the Fund's position regarding the dependency of stepchildren.

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Respondent No. 2 contended that Taylan Ferrington was receiving a form of State or Federal aid at the time of Floyd Lundy's death due to a hearing deficit.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

From a review of the record as a whole, to include medical reports, documents, and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witness and to observe her demeanor, the following findings of fact and conclusions of law are made in accordance with A.C.A. § 11-9-704:

- 1) The Arkansas Workers' Compensation Commission has jurisdiction of this claim.
- 2) The stipulations agreed to by the parties at the full hearing and contained in the record herein were reasonable and are hereby accepted as fact.
- 3) Claimants, Taylan and Gavin Ferrington, have failed to prove by a preponderance of the evidence that they were wholly and actually dependent on Floyd Lundy at the time of his injury and death. As such, Taylan and Gavin Ferrington are deemed not to be lawful beneficiaries of Floyd Lundy pursuant to the Arkansas Workers' Compensation Act.
- 4) Pursuant to the ruling herein and the joint stipulations of fact blue-backed at Commission Exhibit No. 2, the appropriate apportionment for beneficiary benefits would equal \$247.16 per week for the widow and \$105.92 per week for Logan Lundy and \$105.92 per week for Dustin Lundy.

**DISCUSSION**

**I. HISTORY**

Floyd Lundy died as a result of an injury arising out of and in the course of his

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employment which occurred on December 8, 2005. The claimants at issue for the purpose of this hearing are Taylan and Gavin Ferrington, who were Mr. Lundy's stepchildren at the time of his death and work-related injuries. At the time of Mr. Lundy's death, Mr. Lundy also had two biological children by the names of Dustin Lundy and Logan Lundy. At the time of Mr. Lundy's death, he was married to Tasha Lundy, who is the biological mother of Taylan and Gavin Ferrington.

According to the testimony of Ms. Tasha Lundy, she was previously married to a Mr. Jon Ferrington, who is the biological father of the claimants in this matter, Taylan and Gavin Ferrington. Ms. Lundy testified that Taylan and Gavin Ferrington were born of the marriage between her and Jon Ferrington, and that that marriage ended in divorce on October 23, 2001. The divorce decree of Ms. Tasha Ferrington and Jon Ferrington is contained in the record herein at Respondent No. 2's Exhibit No. 1. In said divorce decree both Mr. Jon Ferrington and Ms. Tasha Ferrington now Lundy were awarded joint custody of the minor children, Taylan and Gavin Ferrington. The divorce decree contained in the record also ordered Mr. Jon Ferrington to pay child support in the amount of \$35.00 per week for the minor children of the marriage.

Subsequent to Tasha Lundy's divorce from Jon Ferrington in 2001, she married a Mr. Joe Wilson in 2004. According to the testimony of Ms. Lundy, she divorced

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Mr. Joe Wilson in January of 2005. (T. pg. 54, lines 18-21). Subsequent to Ms. Lundy's divorce from Mr. Joe Wilson in January of 2005, she then married Mr. Floyd Lundy on March 22, 2005. Ms. Lundy testified that prior to marrying Mr. Lundy in 2005, her and Taylan and Gavin Ferrington would live with Ms. Tasha Lundy's parents. Ms. Lundy testified that during the approximately nine months that Ms. Lundy was married to Floyd Lundy up to his death on December 8, 2005, that Mr. Lundy was the primary caregiver of his stepchildren, Taylan and Gavin Ferrington.

However, Ms. Lundy did testify that for the years 2004, 2005, and 2006, Jon Ferrington did pay sporadic child support to her for Taylan and Gavin Ferrington. (T. pg. 40, lines 4-18). In fact, Ms. Lundy testified that shortly before Mr. Lundy's death in December 2005 that she was actively working with the Office of Child Support Enforcement to take Mr. Ferrington back to court to increase his child support. In fact, the day after Mr. Lundy's death, a hearing was held in the Union County Chancery Court, Case No. E-2000-571-2, for modification of Mr. Ferrington's child support obligations regarding Taylan and Gavin Ferrington. As a result of that hearing, Mr. Ferrington's child support for Taylan and Gavin was raised to \$56.00 per week beginning December 9, 2005. Ms. Lundy testified that the process was in motion well before Mr. Lundy's death to increase Mr. Ferrington's child support obligations:

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Q Let me ask you about that last, I guess it would be the, it's actually dated 2006 where the child support was changed to \$56.00. It appears, though, it must have started actually before Mr. Lundy's death that the Office of Child Support Enforcement would have began that process –

A They were beginning it, yes.

Q Do you know about when they began the process to increase the benefit, the custody, I'm sorry, the child support?

A I'm not sure of the exact month, no.

Q But it was sometime in 2005 prior to December?

A Yes.

(T. pg. 41, lines 8-21).

Q So, then, prior to Mr. Lundy's death you were actually cooperating and assisting the Office of Child Support Enforcement to increase your child support benefits for Taylan and Gavin?

A Yes.

Q And you were also assisting them in seeking arrears on the amounts that he was behind on his child support?

A Yes.

(T. pp. 42-43, lines 18-25, line 1).

After Mr. Lundy's death, Respondent No. 1 began paying beneficiary benefits to both of Mr. Lundy's biological children and both of Mr. Lundy's stepchildren.

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However, Respondent No. 2, Death & Permanent Total Disability Trust Fund, controvert the payment to the decedent's stepchildren because they allege that Taylan and Gavin Ferrington were not wholly and actually dependent upon Mr. Lundy at the time of his death. Respondent No. 2 principally rely on Hoskins v. Rogers Cold Storage, 52 Ark. App. 219, 916 S.W.2d 136 (1996).

**II. ADJUDICATION**

Where death results from an injury arising out of and in the course of employment, a child of the deceased worker may be entitled to compensation. The statutory definition of "child" includes a stepchild of the deceased worker. A.C.A. § 11-9-102(2). However, persons claiming compensation for the death of an employee must show by a preponderance of the evidence that they were "wholly and actually dependent" on the deceased employee. A.C.A. § 11-9-527(c). It is not disputed that the claimants in this matter, Taylan and Gavin Ferrington, were the stepchildren of Floyd Lundy when he died. The disagreement involves whether the appellants were wholly and actually dependent upon Mr. Lundy when he died so as to be entitled to dependency benefits pursuant to A.C.A. § 11-9-527(c). Section (h) of A.C.A. § 11-9-527 states that "All questions of dependency shall be determined as of the time of the injury." For the claimants to be found to be lawful beneficiaries under the Arkansas Workers' Compensation Commission Act of Mr. Lundy, they must prove by a

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preponderance of the evidence that they were wholly and actually dependent upon Mr. Lundy at the time of the injury that lead to his death.

Dependency is an issue of fact rather than a question of law, and the issue is to be resolved based upon the facts present at the time of the compensable injury.

Hoskins v. Rogers Cold Storage, 52 Ark. App. 219, 916 S.W.2d 136 (1996). The facts presented to the Commission in this matter regarding whether Taylan and Gavin Ferrington were wholly and actually dependent upon Mr. Lundy at the time of his death leave this examiner to find that the claimants, Taylan and Gavin Ferrington, have failed to meet their burden of proof. I find that at the time of Mr. Lundy's death the facts in this case show that Taylan and Gavin Ferrington were not wholly and actually dependent upon Mr. Lundy at the time of his compensable death.

The facts in this matter are very similar to the Hoskins v. Rogers Cold Storage case. The facts in this case show that at the time of Mr. Lundy's death in December of 2005, Mr. Jon Ferrington actually had joint custody of Taylan and Gavin Ferrington. In February of 2007, as shown in Respondent No. 2's Exhibit No. 1, page 3, an order was entered modifying custody. However that was done over one year after Mr. Lundy's death, and the law is clear in this matter that dependency must be determined at the time of death. Further, the facts in this matter show that for the nine months in 2005 that Taylan and Gavin Ferrington were stepchildren of Mr. Floyd Lundy, Mr.

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Jon Ferrington was paying some child support during that time and working. The facts also show in this matter that shortly before Mr. Lundy's untimely death, Ms. Tasha Lundy was actively working with the Office of Child Support Enforcement to receive more child support benefits from Jon Ferrington, and working to receive any back child support that was then due and owing. Ms. Lundy testified that that process for an increase was initiated well before Mr. Lundy's death and that in fact a hearing was held the day after Mr. Lundy's death which increased Mr. Ferrington's child support obligation.

The facts in the Hoskins case are very similar to the case at hand. In Hoskins, the child's natural father had been ordered to pay child support at the time her stepfather died; however, the natural father had not paid any child support before the time of the stepfather's death. In the case at hand the testimony is clear that Mr. Jon Ferrington had been paying child support before Mr. Floyd Lundy passed away and during the time that Mr. Floyd Lundy was married to the children's natural mother, Tasha Lundy. In the case at hand, it is clear that the claimants in this case, Taylan and Gavin Ferrington, had a reasonable expectation of support from their biological father because one, he had been paying support in the past, and two, Tasha Lundy was in ongoing efforts shortly before Mr. Lundy's death to increase the amount of child support Mr. Jon Ferrington was to pay. In Hoskins, the Court of Appeals stated the

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following:

“There was also proof that appellant’s natural father failed to provide support for her during that time span. Nevertheless, the Commission also received evidence that appellant was entitled to receive child support payments from her natural father pursuant to the terms of her parent’s divorce decree that had been entered only two days before the decedent’s death. This indicates that appellant had a reasonable expectancy of support from her natural father when the decedent died. But, that is not the critical inquiry. The issue is whether appellant had a reasonable expectancy of support from the decedent. She was his stepchild, to be sure, and she had enjoyed his support before he married her mother. There was no reason, however, to expect that the decedent was obligated to support appellant at any time. In fact, appellant’s mother demonstrated as much by her conduct in seeking child support payments from appellant’s father in her divorce.”

The facts in this case show that Taylan and Gavin Ferrington were not wholly and actually dependent upon the decedent because they were actually receiving child support in 2005 when their mother was married to Mr. Lundy. Further during the same time that Tasha Lundy was married to Floyd Lundy, she was actively pursuing an increase in child support for Taylan and Gavin Ferrington, which she ultimately received by court order the day after Mr. Lundy’s death. In Hoskins, the Court concluded that the child was not wholly and actually dependent upon the decedent because they had a reasonable expectation of support. In this case, the stepchildren of Floyd Lundy were actually receiving support, and the children through their mother were actually seeking additional child support payments.

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It must be noted that although Taylan and Gavin Ferrington were the stepchildren of Mr. Lundy at the time of his death, the relationship of stepparent and a minor stepchild does not in itself impose any obligation of support on a stepparent. It must be noted that after Ms. Lundy divorced Jon Ferrington, she married Mr. Joe Wilson. Mr. Wilson during the time of their marriage was also the stepparent of Taylan and Gavin Ferrington; however, subsequent to Ms. Lundy's divorce from Mr. Wilson, Mr. Wilson had no obligation to support the children. There was no testimony that Mr. Wilson continued to support the children. Further, the children, Taylan and Gavin Ferrington, would have no expectation to receive support from Mr. Wilson. After Tasha Lundy divorced Mr. Wilson, she then married Floyd Lundy; however, during her marriage of approximately nine months to Mr. Lundy, Jon Ferrington still retained joint custody pursuant to the divorce decree between Mr. Jon Ferrington and Tasha Ferrington, and paid child support.

On the facts presented in this case, I am unable to conclude that Taylan and Gavin Ferrington were "wholly and actually dependent" upon Floyd Lundy when he died. As such, I find that the claimants, Taylan and Gavin Lundy, have failed to prove by a preponderance of the evidence that they were wholly and actually dependent upon the deceased employee, Floyd Lundy, at the time of his death. Therefore, Taylan and Gavin Ferrington's request for beneficiary benefits in this matter are hereby

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denied.

**IT IS SO ORDERED.**

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**S. DALE DOUTHIT**  
**Administrative Law Judge**

SDD/pjb